

1411397 (Migration) [2015] AATA 3347 (3 September 2015)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Jekaterina Kozevnikova

CASE NUMBER: 1411397

DIBP REFERENCE(S): CLF2013/290632

MEMBER: Glynis Bartley

DATE: 3 September 2015

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211 of Schedule 2 to the Regulations
- cl.820.221 of Schedule 2 to the Regulations
- r.2.03A

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3 September 2015 at 3:41pm

Statement made on

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 25 November 2013 on the basis of her relationship with her sponsor, Mr Edward Joseph Wasil. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on 19 June 2014 on the basis that the applicant did not satisfy cl.820.211 because the delegate was not satisfied that the applicant and her sponsor had been in a de facto relationship for 12 months at the time of application.
4. On 26 June 2014 the applicant lodged an application for review of the decision with this Tribunal.
5. The applicant appeared before the Tribunal on 24 July 2015 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and Mr Andrew Steuuk in person, and from Ms Jenny Spooner by telephone.
6. The applicant was represented in relation to the review by her registered migration agent who did not appear at the hearing.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

BACKGROUND

8. The applicant was born in Lithuania in 1973 and is a citizen of Lithuania. She is currently 42 years old. The applicant has declared one previous marriage in 1996 that ended in divorce in 1998. There were no children from that relationship. The applicant's father is deceased. Her mother resides in Lithuania and she has one brother living in Belarus. The applicant first travelled to Australia on 8 February 2013 on a Visitor visa (Subclass 651), which ceased on 14 December 2013.
9. The applicant's sponsor was born in Germany in 1949 and is currently 66 years old. He migrated to Australia in 1955 and was subsequently granted Australian citizenship. He has declared one previous marriage in 1971 that ended with the death of his wife in 2010. The sponsor has three adult children from that relationship (two daughters and a son), all of whom live in Australia. The sponsor's parents are deceased. He has two sisters living in Australia. At the time of application the sponsor stated that he was employed as the director of an electrical engineering company.
10. The parties stated that they met during a cruise in Norway in May 2012. The applicant was employed as a massage therapist on the cruise ship and the sponsor was a passenger. The parties committed to a relationship in November 2012.

11. The applicant provided documents to the Department in support of the application including but not limited to the following: documents regarding their identities and marital status, a joint relationship statement, correspondence sent to the parties at a mutual address, travel receipts, statutory declarations and statements by witnesses, photographs and joint bank account statements.
12. On 23 April 2014 the Department requested that the applicant provide additional information, including evidence that the parties had been in a de facto relationship for at least 12 months prior to the lodgement date. In response, the applicant provided additional supporting statements, joint bank account statements and a copy of the sponsor's will.
13. In the Record of Decision, a copy of which the applicant provided to the Tribunal, the delegate said that she was not satisfied that the parties had established a shared household, with shared responsibilities for the running of the household, from 25 November 2012. The delegate acknowledged the evidence provided regarding the social aspects of the relationship, but concluded that there was not convincing evidence that in the 12 months prior to the application lodgement the parties had presented themselves as a de facto couple to family or the wider community, that they undertook regular joint social activities or attended any significant events together. While the delegate was satisfied that the parties had known one another since 23 May 2012 and commenced a relationship at that time, the delegate said that there was no convincing documentary evidence that the parties saw the relationship as a long term one or had a commitment to a shared life together 12 months prior to the application lodgement. The delegate said that the parties had not provided any submissions regarding waiver of the 12 months de facto requirement and as such she was not satisfied that compelling reasons exist.
14. Prior to and at the hearing the applicant provided additional documents to the Tribunal including but not limited to the following: copies of the applicant's and sponsor's wills, written submissions by the applicant's migration agent, a contract for the purchase of a home in Queensland in joint names, documents regarding a Notice of Intention to Marry form, a photograph of the applicant with the sponsor's former father-in-law, a letter to the parties from the sponsor's former father-in-law, documents regarding the registration of a business in joint names in May 2015, a supporting letter from the sponsor's accountant, a newspaper article showing the parties together at a social event in Orange, a letter from the sponsor's general practitioner, joint bank account statements and records of Skype conversations between the parties.

CONSIDERATION OF CLAIMS AND EVIDENCE

15. The issue in the present case is whether the applicant is the de facto partner of the sponsor.
16. In making its findings, the Tribunal has considered documents contained in the Department and Tribunal files as well as the oral evidence provided at the hearing by the applicant, her sponsor and the witnesses. The Tribunal has also taken into account the additional information received after the hearing on 1 September 2015.
17. The parties' oral evidence regarding the circumstances in which they met, the development of their relationship and their current living arrangements was consistent and coherent. The Tribunal found them to be credible, in particular the sponsor who was open about matters that were potentially adverse to his interests. The Tribunal accepts that the applicant and her sponsor met in Norway in May 2012 and formed a relationship soon afterwards. They spent two weeks with one another in Turkey in November 2012 before the applicant travelled to Australia to visit the sponsor in February 2013. She last arrived in Australia on 14 September 2013. The Tribunal accepts that the applicant and her sponsor plan to marry later this year.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

18. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

19. 'De facto partner' is defined in s.5CB of the Act and provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
20. In forming an opinion about whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.

21. Financial aspects of the relationship

22. The applicant is not currently in paid employment and is being financially supported by the sponsor. The sponsor owns an electrical engineering company in Bathurst and receives income from that business. The sponsor has owned a home in Orange for some years and in December 2014 the parties purchased a home together in Queensland in joint names for \$870,000. Supporting documentation was provided to the Tribunal about the purchase of that property. At present they are dividing their time between the properties in Orange and the Gold Coast. The applicant and her sponsor gave consistent evidence that the applicant did not contribute to the purchase price of the Gold Coast property.
23. The parties do not have any joint liabilities. They have a joint bank account which is used for savings and they gave consistent evidence that the applicant contributed some money to that account at the time that it was established. The sponsor said the amount was around \$3,000 to \$4,000. The parties' joint bank shows usual expenditure at food outlets, petrol stations and supermarkets in both Queensland and New South Wales.
24. The Tribunal accepts that the parties have been pooling their financial resources and sharing day-to-day household expenses since the applicant arrived in Australia in February 2013, although the applicant has had limited means given she is not currently employed.
25. The Tribunal is satisfied that the financial aspects of the parties' relationship are consistent with a genuine spousal relationship.

26. Nature of the household

27. As noted above, the applicant first came to Australia to spend time with the sponsor in February 2013. Since then she has been absent from Australia for a total period of around four months. Prior to February 2013, the parties spent two weeks staying in a hotel together in Turkey. The parties have predominantly been living in the sponsor's home in Orange since the applicant arrived in Australia, but they have also spent time travelling and have lived together in their home on the Gold Coast.

28. The parties gave consistent evidence about their household arrangements. The applicant is responsible for the majority of the household chores, including cooking and cleaning. They generally do the grocery shopping together. The applicant and her sponsor do not have any joint responsibility for the care and support of children.
29. The evidence of the establishment of a joint household provides significant weight in support of a finding of a genuine and continuing relationship.

30. *Social aspects of relationship*

31. The parties provided statutory declarations and statements from their friends, neighbours, the sponsor's accountant and his general practitioner attesting to the genuineness of the relationship. The Tribunal also received oral evidence at the hearing from one of the parties' neighbours in Orange and a friend of the sponsor. Both witnesses said that they have witnessed the development of the parties' relationship over recent years and see them together regularly. They told the Tribunal that the applicant and her sponsor are in a close and supportive relationship. Mr Steuuk told the Tribunal that the sponsor was very depressed and lonely after his wife died and his relationship with the applicant has transformed him emotionally. The Tribunal found Mr Steuuk and Ms Spooner to be credible witnesses and places weight on their oral evidence.
32. There was considerable evidence before the Tribunal to support the parties' oral evidence that they have been on a number of holidays together since the commencement of the relationship in May 2012, including to Turkey and to various locations within Australia.
33. The applicant gave evidence that she and the sponsor like to spend time on the coast and also going to movies together. They enjoy being in one another's company. The parties have done considerable work together renovating their Queensland property since it was purchased last year. Photographs and a newspaper article provided to the Tribunal show them socialising with friends and attending a local art event in Orange.
34. The sponsor is aware of the applicant's family members and has had some contact with her mother through Skype. The Tribunal accepts on the basis of the sponsor's oral evidence that his children are aware of the relationship, however they do not accept or support it. Consequently, he is having minimal contact with his adult daughters or their families at present. The sponsor's son works in the sponsor's business and so he has regular contact with him through work. The sponsor said that his children have made comments about the age difference between the parties. One of his daughters once commented that the applicant was not her mother.
35. The applicant provided a letter and a photograph from the sponsor's former father-in-law to show that he has met the applicant and is supportive of the parties' relationship.
36. On the basis of the oral evidence of the parties, the witness statements and photographs provided, the Tribunal finds that the relationship between the applicant and her sponsor is recognised and supported by their friends, neighbours and others in the broader community, including the sponsor's general practitioner and accountant. The oral evidence given by the witnesses at the hearing and also the statutory declarations and witness statements confirm that the parties' relationship is genuine. Considerable detail was provided in the supporting statements and statutory declarations and the Tribunal places weight on that evidence. The information provided by the witnesses is consistent with the oral evidence provided at the hearing by the applicant and her sponsor. The Tribunal is satisfied that the parties represent themselves as being in a de facto relationship to their family, friends and the wider community.

37. *Nature of persons' commitment to each other*

38. The Tribunal finds the applicant and her sponsor have been in a committed relationship since 2013 and have now lived together for more than two years. The parties gave consistent evidence that they intend to marry later this year and provided some supporting evidence regarding the wedding, including an email from a marriage celebrant. That evidence impressed as sincere.
39. The Tribunal accepts on the basis of the parties' oral evidence and the evidence of witnesses that the parties provide one another with companionship and emotional support. A letter from Dr J McRae, dated 21 July 2015, stated that he has known the sponsor for a period of five years following the death of his wife and that, understandably, the sponsor was severely affected by grief and this impacted upon his own health. Dr McRae said that he has known the applicant for a period of two years and finds her to be a genuine person and in a very strong and stable relationship with the sponsor. He said that it has certainly been beneficial to the sponsor's health to have established a relationship with the applicant. Dr McRae raised concerns about the sponsor's ability to care for himself without the applicant's assistance. Dr McRae stated that the applicant and her sponsor are certainly in a genuine relationship and appreciate each other's care; the relationship is beneficial to both parties.
40. Mr David Cooke, the sponsor's accountant, wrote a letter in support of the application on 6 July 2015. Mr Cook stated that he has known the sponsor for over 30 years and that he assisted the parties to purchase the Queensland property. The letter says that throughout their numerous discussions and meetings with the parties, it was very clear that they are in a relationship. They speak of their life together in the context of the new property they have purchased in terms of growing organic food and taking care of one another.
41. The applicant provided copies of the parties' wills and a superannuation beneficiary nomination form. Those documents indicate a level of commitment to the relationship on both their parts, and in particular the sponsor given his considerable assets. The Tribunal notes that the sponsor's will is detailed and that he has made provision for his adult children as well as the applicant.
42. The parties demonstrated a good understanding of the circumstances of one another's families and relationship histories at the hearing. They gave consistent evidence about their future plans to develop their Gold Coast property and establish a health spa and retreat. Given their ages, they have made a mutual decision not to have children together.
43. The applicant and her sponsor presented as being committed to a long term relationship. The degree of companionship and emotional support the parties clearly draw from one another provides significant weight in support of a finding that they are in a genuine and continuing relationship.

44. *Conclusion on spouse/de facto criteria*

45. Having regard to all the circumstances of this relationship, the Tribunal is satisfied that the applicant and her sponsor have a mutual commitment to a shared life together to the exclusion of all others. The Tribunal is satisfied that the relationship between them is genuine and continuing. The Tribunal finds that they live together and that therefore they do not live separately and apart on a permanent basis. The parties are not related by family. The Tribunal finds that the requirements of s.5CB(2) are met at the time of the application and at the time of decision.

46. The applicant's sponsor has turned 18 years of age and therefore satisfies the criteria in cl.820.211(2)(c). At the time of application the applicant held a substantive visa and so the criteria in cl.820.211(2)(d) is not relevant.
47. The Tribunal further finds that at the time of this decision the applicant continues to be the sponsor's de facto partner, and continues to meet the requirements of cl.820.211(2).
48. Therefore, the applicant meets cl.820.211 and cl.820.221.

ARE THE ADDITIONAL CRITERIA FOR A DE FACTO RELATIONSHIP MET?

49. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. These are: that the couple are both at least 18 years of age; and with limited exceptions, that the applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application, unless he or she can establish compelling and compassionate circumstances for the grant of the visa.
50. The Tribunal finds, having regard to the parties' passports, that both were at least 18 years of age at the relevant time.
51. The requirement that the relationship existed for 12 months prior to the application does not apply in certain circumstances where the sponsor is or was a humanitarian visa holder, or for applications made on or after 9 November 2009, where the de facto relationship has been registered under a relevant State or Territory law: r.2.03(4), (5).
52. Following the hearing the applicant provided the Tribunal with a copy of a Registered Relationship Certificate issued by the Queensland Registrar-General, dated 27 August 2015. The requirement that the relationship existed for 12 months prior to the application therefore does not apply.
53. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.

54. CONCLUSION

55. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

56. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211 of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations.
 - r.2.03A

Glynis Bartley
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).